

Oil Pollution Act of 1990 Interim Claims Regulations

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October 28, 1992

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 135, 136, and 137

[CGD 91-035]

RIN 2115-AD90

Claims Under the Oil Pollution Act of 1990

AGENCY: Coast Guard, DOT.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule implements the provisions of the Oil Pollution Act of 1990 (OPA 90) concerning the filing of claims for uncompensated removal costs or damages resulting from the discharge of oil, designation of the source of the discharge, and advertisement of where claims are to be filed. This action is an interim measure needed primarily to explain how eligible claimants may file a claim against the Oil Spill Liability Trust Fund. In response to comments received regarding this rule, a more comprehensive rule may be developed and published for public comment. This rule will facilitate the presentation, filing, processing, settlement, and adjudication of claims against the Fund.

DATES: This rule is effective on [Insert date of publication in the FEDERAL REGISTER.]. Comments on this rule must be received on or before [Insert date 120 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G-LRA-2/3406) (CGD91-035), U.S. Coast Guard Headquarters, 2100 Second Street S.W. Washington, DC 20593-0001, or may be delivered to Room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. the telephone number is (202) 267-1477. Comments on collection of information requirements also must be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, N.W., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at Room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Ms. L E. Burgess (Project Manager), National Pollution Funds Center, (703) 235-4796.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should provide three copies of their comments and include their names and addresses, identify this rulemaking (CGD 91-035) and the specific section of the rule to which each comment applies, and give the reason for each comment. Each person wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Marine Safety Council at the address under "ADDRESSES". If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the FEDERAL REGISTER.

Drafting Information

The principal person involved in drafting this document is CDR Tom Woodward (Project Counsel), National Pollution Funds Center.

Regulatory Information

This rule is being published as an interim rule and is being made effective on the date of publication to make the claims process provided by the Oil Pollution Act of 1990 (OPA 90) for uncompensated claims immediately available to those eligible to file a claim against the Oil Spill Liability Trust Fund (the Fund). A delay in providing a claims procedure may delay the payment of compensation due claimants who have been damaged by oil pollution, or who have incurred costs as a result of oil removal and who are eligible to file a claim against the Fund. The Coast Guard specifically requests comments on this interim rule. However, a separate, more comprehensive rule may be developed to supersede this interim rule. The more comprehensive rule would follow publication of a notice of proposed rulemaking. For these reasons, the Coast Guard for good cause finds, under 5 U.S.C. 553(b)(3)(B) and (d)(3), that notice and public procedure thereon before the effective date of the interim rule are unnecessary and that the interim rule should be made effective in less than 30 days after publication.

Discussion of Amendments

This rule implements sections 1013, Claims Procedure, and 1014, Designation of Source and Advertisement, of the Oil Pollution Act of 1990 (Pub.L. 101 -380; August 18, 1990) (OPA 90). OPA 90 repealed or superseded certain provisions of four Federal statutes which established liability and compensation regimes relating to oil pollution. It consolidated the requirements of the four regimes and expanded them. The money remaining in the funds under three of those regimes was transferred to the Oil Spill Liability Trust Fund (the Fund).

OPA 90 preserves the concept that those responsible for pollution incidents have the primary duty to respond to claims arising out of the polluting incidents they cause. In addition to requiring the responsible party to advertise the procedures by which claims can be presented to them, OPA 90 provides that, with certain exceptions, a claim cannot be presented to the Fund until it has been presented to the responsible party (or the guarantor) of the vessel, facility, or other source designated as the source of the pollution and has been denied or remains unpaid for 90 days. Like the incentives provided to ensure that polluters take proper cleanup actions, OPA 90 provides methods to ensure that it will not be profitable for polluters to default on the obligation to accept and pay valid damage claims. For example, section 1015 of OPA 90 provides that, if the Fund pays a claim, a cause of action exists to recover not only any compensation paid, but also all costs incurred by the Fund by reason of the claim, including interest, administrative and adjudicative costs, and attorney's fees.

Because of the broader scope of damages and expanded applicability of the OPA regime, the Coast Guard recognized that the development of comprehensive claims regulations would be complex and time consuming. Therefore, in an effort to provide an interim means by which one could file a claim with the Fund, the Coast Guard decided to draw upon the regulations used under previous regimes and publish this interim rule. This rulemaking is effective on publication in the FEDERAL REGISTER. It may be replaced by a more comprehensive rule, which will be developed under a separate rulemaking docket number and published first as a notice of proposed rulemaking for public comment. The separate rule could deviate substantially from this interim rule after consideration of comments on the interim rule after experience is gained in applying the interim rule.

This interim rule is based in part on the claims regulations in 33 CFR Part 136 originally developed for claims arising from offshore oil production activities. It also incorporates some traditional claims adjudication concepts from the Coast Guard's general claims regulations in 33 CFR Part 25. The concepts and procedures from both of these sets of regulations have been expanded to encompass OPA 90's broader coverage. In addition, the rules in Subpart D of 33 CFR Part 135 concerning designation of the source of a discharge and concerning advertisements indicating where and how claims may be filed were used as a model in preparing Subpart D of the interim rule.

In developing this rule, the Coast Guard consulted with the Department of Justice, Department of Interior, Department of Agriculture, the Environmental Protection Agency, and the National Oceanic and Atmospheric Administration. Also, the Coast Guard consulted with industry experts on pollution claims adjustment, underwriting, and litigation.

Legal issues concerning whether, under section 1013, Federal, State or Indian tribe trustees can claim against the Fund for natural resources damages and whether Federal agencies can claim against the Fund for any costs or damages have been raised. These issues are presently under review. This interim rule does not resolve these issues and leaves the matters open for future decision.

This rule establishes requirements primarily concerning presentation of claims, designation of sources, and advertisement of designations. These procedures are summarized and explained as follows.

Under OPA 90, when an oil spill or "incident" occurs and the source of the discharge is known, a Federal official, usually the Federal On-Scene Coordinator, designates the vessel, facility, or pipeline discharging the oil as the "source" of the discharge. Once the source is designated, the official notifies the "responsible party" (i.e., the owner or operator of the source) of the designation by means of a written "Notice of Designation". The responsible party then advertises (in newspapers, on radio, etc.) that designation and the procedures by which claims may be presented to the responsible party or that party's guarantor. If the responsible party denies the designation, the source of the discharge is a public vessel, or the source of the discharge is unknown, the National Pollution Funds Center advertises the procedures by which claims may be presented to the Fund.

In addition to the procedures discussed above, this rulemaking also amends existing 33 CFR Part 135 (Offshore Oil Pollution Compensation Fund). The offshore fund was terminated by OPA 90 and all amounts remaining in that fund were transferred to the Oil Spill Liability Trust Fund. These amendments are ministerial in nature and are intended to remove obvious conflicts between the old and the new regulations.

Regulatory Evaluation

This rule is not major under Executive Order 12291 and not significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a separate Regulatory Evaluation is unnecessary.

This rule, for the most part, is procedural; it provides a process by which the responsible party is identified and required to advertise and by which persons damaged by oil pollution may submit claims against the Fund. The major impact of this rule arises from the procedures inherent in the process of documenting, preparing, and submitting a

claim. For example, this rulemaking lists what information must be gathered, what proof is necessary to substantiate the claim, generally how the claim itself must be prepared, and where the claim must be submitted.

The impact of these procedures defies precise quantification. The paperwork burdens on a particular claimant will vary greatly with the nature of the claim. For example, a claim could be as basic as one for oil stains on a boat's hull or as complex as damage to a variety of natural resources over a wide geographic area. The information to be included with the claim may be readily at hand or may need to be obtained from outside sources such as appraisers. Apart from the burden of documenting a claim, which is inherent in any claims process (a burden which is not imposed by, but rather clarified in, these regulations), the burden imposed by these regulations should be minimal.

This rule also specifies the requirement for responsible parties, or their guarantors, to advertise how claims are to be presented to them, as required by section 1014 of OPA 90 (33 U.S.C. 2714). The costs involved here are the costs incurred by the responsible party or guarantor in preparing and publishing, or otherwise disseminating, the information. These costs will vary depending on the level of advertisement required considering such factors as the extent of the damage, the size of the geographic area affected, and the number and location of potential claimants.

This rule benefits parties incurring a loss due to oil pollution by providing a procedure for designation of source so responsible parties may advertise procedures for paying claims. It also facilitates presentation of uncompensated claims to the Fund. Generally, these procedures will reduce the likelihood of unnecessary litigation.

Though the Coast Guard expects the economic impact of this rule to be minimal, it specifically requests comments and data on this subject.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Coast Guard must consider whether this rule will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

The burden of submitting a claim has a potential economic impact on all entities, large and small. This rule affects entities of all sizes, and thus could affect a substantial number of small entities. However, the economic impact is likely to be minimal on the vast majority of concerns. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. If, however, you think that your business qualifies as a small entity and that this proposal will have a significant economic impact on your business, please submit a

comment (see "ADDRESSES") explaining why you think your business qualifies and in what way and to what degree this proposal will economically affect your business.

Federalism

The Coast Guard has analyzed this rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Preemption

This rule does not preempt the authority of any State or political subdivision thereof from implementing their own compensation and liability regimes.

Collection of Information

Under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) reviews each rule that contains a collection of information requirement to determine whether the practical value of the information is worth the burden imposed by its collection. The collection of information requirements include reporting, recordkeeping, notification, and other, similar requirements.

This rule prescribes requirements for claims against the Fund, such as what a claim must contain, what proof must be included, and how and where it must be submitted. This rule also prescribes how responsible parties are to advertise the manner in which claims may be presented directly to them. Although the rule constitutes an "information collection requirement" under the Paperwork Reduction Act, it is a voluntary procedure which only applies to those who choose to file a claim with the Fund. The paperwork and reporting burdens are identified and discussed in the "Regulatory Evaluation" section of this preamble.

The Coast Guard has submitted the collection of information requirements to OMB for review under section 3501(h) of the Paperwork Reduction Act and OMB has approved them for this interim rule. The part number is Part 136 and the corresponding OMB approval number is OMB Control Number 2115-XXXX. Persons submitting comments on the collection of information requirements should submit their comments both to OMB and to the Coast Guard where indicated under "ADDRESSES".

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under section 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation.

This rule concerns procedures relating to submission and settlement of claims and has no environmental impact. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under "ADDRESSES".

List of Subjects

33 CFR Part 135

Advertising, Claims, Continental shelf, Oil pollution.

33 CFR Part 136

Administration practice and procedure, Claims, Oil pollution.

33 CFR Part 137

Claims, Harbors, Insurance, Oil pollution, Reporting and recordkeeping requirements,
Vessels.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR Parts 135, 136, and 137 as follows:

PART 135 - OFFSHORE OIL POLLUTION COMPENSATION FUND

1. The authority citation for Part 135 is revised to read as follows:

Authority: 33 U.S.C. 2701-2719; E.O. 12777, 56 FR 54757; 49 CFR 1.46.

2. The heading for Subpart D is revised to read as follows:

Subpart D - Notification of Pollution Incidents

Subpart D [Amended]

3. In Subpart D, remove the undesignated section headings "Notification", "Designation", and "Advertisement".

§ 135.301 [Removed]

4. Section 135.301, Purpose, is removed.

§ 135.303 [Amended]

5. In § 135.303, remove Paragraphs (a)(1) and (a)(2) and redesignate paragraph (a)(3) as an undesignated paragraph.

§ 135.309 through 135.319 [Removed]

6. Sections 135.309 through 135.319 are removed.

7. Part 136 and its authority citation are revised to read as follows:

PART 136 - OIL SPILL LIABILITY TRUST FUND; CLAIMS PROCEDURES;
DESIGNATION OF SOURCE; AND ADVERTISEMENT

Subpart A - General Sec.

136.1 Purpose and applicability.

136.3 Information.

136.5 Definitions.

136.7 Foreign claimants.

136.9 Falsification of claims.

Subpart B - General Procedure

136.101 Time limitation on claims.

136.103 Order of presentment.

136.105 General requirements for a claim.

136.107 Subrogated claims.

136.109 Removal costs and multiple items of damages.

136.111 Insurance.

136.113 Other compensation.

136.115 Settlement and notice to claimant.

Subpart C - Procedure for Particular Claims

REMOVAL COSTS

136.201 Authorized claimants.

136.203 Proof

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NATURAL RESOURCES

136.207 Authorized claimants.

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136.211 Compensation allowable.

REAL OR PERSONAL PROPERTY

136.213 Authorized claimants.

136.215 Proof.

136.217 Compensation allowable.

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- 136.219 Authorized claimants.
- 136.221 Proof.
- 136.223 Compensation allowable.

GOVERNMENT REVENUES

- 136.225 Authorized claimants.
- 136.227 Proof.
- 136.229 Compensation allowable.

PROFITS AND EARNING CAPACITY

- 136.231 Authorized claimants.
- 136.233 Proof.
- 136.235 Compensation allowable.

GOVERNMENT PUBLIC SERVICES

- 136.237 Authorized claimants.
- 136.239 Proof.
- 136.241 Compensation allowable.

Subpart D - Designation of Source and Advertisement

GENERAL

- 136.301 Purpose.
- 136.303 Definitions.

DESIGNATION OF SOURCE

- 136.305 Notice of designation.
- 163.307 Denial of designation.

ADVERTISEMENT

- 136.309 Advertisement determinations.
- 136.311 Types of advertisement.
- 136.313 Content of advertisement.

AUTHORITY: 33 U.S.C. 2713,2714; E.O. 12777,(56 FR 54757); 49 CFR 1.46.

Subpart A - General

§ 136.1 Purpose and applicability.

- (a) This part prescribes regulations for --
 - (1) Presentation, filing, processing, settlement, and adjudication of claims

authorized to be presented to the Oil Spill Liability Trust Fund (the Fund) under section 1013 of the Oil Pollution Act of 1990 (the Act) (33 U.S.C. 2713) for certain uncompensated removal costs or uncompensated damages resulting from the discharge, or substantial threat of discharge, of oil from a vessel or facility into or upon the navigable waters, adjoining shorelines, or the exclusive economic zone;

(2) Designation of the source of the incident, notification to the responsible party of the designation, and advertisement of the designation and claims procedures; and

(3) Other related matters.

(b) This part applies to claims resulting from incidents occurring after August 18, 1990.

(c) Nothing in this part --

(1) Preempts the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to --

(i) The discharge of oil or other pollution by oil within such State; or

(ii) Any removal activities in connection with such a discharge; or

(2) Affects or modifies in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law; or

(3) Affects the authority of any State --

(i) To establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(ii) To require any person to contribute to such a fund; or

(4) Affects the authority of the United States or any State or political subdivision thereof to impose additional liability or additional requirements relating to a discharge, or substantial threat of a discharge, of oil.

§ 136.3 Information.

Anyone desiring to file a claim against the Fund may obtain general information on the procedure for filing a claim from the Director, National Pollution Funds Center, Suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804, (703) 235-4756.

§ 136.5 Definitions.

(a) As used in this part, the following terms have the same meaning as set forth in sections 1001 and 1007(c) of the Act (33 U.S.C. 2701 and 2707(c)): "claim", "claimant", "damages", "discharge", "exclusive economic zone", "facility", "foreign claimant", "foreign offshore unit", "Fund", "guarantor", "incident", "National Contingency Plan", "natural resources", "navigable waters", "offshore", "facility", "oil", "onshore facility", "owner or operator", "Person", "removal costs", "responsible party", "State", "United States", and "vessel".

(b) As used in this part

"Act means Title I of the Oil Pollution Act of 1990 (Pub.L. 101-380; 33 U.S.C 2701 through 2719).

"Director, NPFC" means the person in charge of the U.S. Coast Guard National Pollution Funds Center or that person's authorized representative.

'FOSC' means the Federal On-Scene Coordinator designated under the National Contingency Plan or that person's authorized representative.

"NPFC" means the U.S. Coast Guard National Pollution Funds Center, Suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804.

§ 136.7 Foreign claimants.

In addition to other applicable limitations on presenting claims to the Fund, claims by foreign claimants to recover removal costs or damages may be presented only when the requirements of section 1007 of the Act (33 U.S.C. 2707) are met.

§ 136.9 Falsification of claims.

Persons submitting false claims or making false statements in connection with claims under this part may be subject to prosecution under Federal law, including but not limited to 18 U.S.C. 287 and 1001. In addition, persons submitting written documentation in support of claims under this part which they know, or should know, is false or omits a material fact may be subject to a civil penalty of up to \$5,000 for each claim. If any payment is made on the claim, the claimant may also be subject to an assessment of up to twice the amount claimed. These civil sanctions may be imposed under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, as implemented in 49 CFR Part 31.

Subpart B - General Procedure

§ 136.101 Time limitations on claims.

(a) Except as provided under section 1012(h)(3) of the Act (33 U.S.C. 2712(h)(3)) (minors and incompetents), the Fund will consider a claim only if presented in writing to the Director, NPFC, within the following time limits:

(1) For damages, within three years after --

(i) The date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care.

(ii) In the case of natural resources damages under section 1002(b)(2)(A) of the Act (33 U.S.C. 2702(b)(2)(A)), the date under paragraph (a)(1)(i) of this section, or within three years from the date of completion of the natural resources damage assessment under section 1006(c) of the Act (33 U.S.C. 2706(c)), whichever is later.

(2) For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOSC determines that the removal actions which form the basis for the costs being claimed are complete, whichever is earlier.

(b) Unless the Director, NPFC, directs in writing that the claim be submitted elsewhere, a claim is deemed presented on the date the claim is actually received at the National Pollution Funds Center, Suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804. If the Director, NPFC, directs that the claim be presented elsewhere, the claim is deemed presented on the date the claim is actually received at the address in the Commander's directive.

§ 136.103 Order of Presentment.

(a) Except as provided in paragraph (b) of this section, all claims for removal costs or damages must be presented first to the responsible party or guarantor of the source designated under § 136-305.

(b) Claims for removal costs or damages may be presented first to the Fund only --

(1) By any claimant, if the Director, NPFC, has advertised, or otherwise notified claimants in writing, in accordance with § 136.309(c);

(2) By a responsible party who may assert a claim under section 1008 of the Act (33 U.S.C. 2708);

(3) By the Governor of a State for removal costs incurred by that State; or

(4) By a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a) of the Act (33 U.S.C. 2712(a)).

(c) If a claim is presented in accordance with paragraph (a) of this section and --

(1) Each person to whom the claim is presented denies all liability for the claim; or

(2) The claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to § 136.309(d), whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) No claim of a person against the Fund will be approved or certified for payment during the pendency of an action by the person in court to recover costs which are the subject of the claim.

§ 136.105 General requirements for a claim.

(a) The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

(b) Each claim must be in writing for a sum certain for compensation for each category of uncompensated damages or removal costs (as described in Subpart C of this part) resulting from an incident. If at any time during the pendency of a claim against the Fund the claimant receives any compensation for the claimed amounts, the claimant shall immediately amend the claim.

(c) Each claim must be signed in ink by the claimant certifying to the best of the claimant's knowledge and belief that the claim accurately reflects all material facts.

(d) In addition to the other requirements of this section, any claim presented by a legal representative of the claimant must also be signed by the legal representative and

(1) Be presented in the name of the claimant;

(2) Show the title or legal capacity of the representative; and

(3) Provide proof of authority to act for the claimant.

(e) Each claim must include at least the following, as applicable.:

(1) The full name, street and mailing addresses of residence and business, and telephone numbers of the claimant.

(2) The date, time, and place of the incident giving rise to the claim.

(3) The identity of the vessel, facility, or other entity causing or suspected to have

caused the removal costs or damages claimed and the basis for such identity or belief.

(4) A general description of the nature and extent of the impact of the incident, the costs associated with removal actions, and damages claimed, by category as delineated in Subpart C of this part, including, for any property, equipment, or similar item damaged, the full name, street and mailing address, and telephone number of the actual owner, if other than the claimant.

(5) An explanation of how and when the removal costs or damages were caused by, or resulted from, an incident.

(6) Evidence to support the claim.

(7) A description of the actions taken by the claimant, or other person on the claimant's behalf, to avoid or minimize removal costs or damages claimed.

(8) The reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with preparation of the claim.

(9) To the extent known or reasonably identifiable by the claimant, the full name, street and mailing address, and telephone number of each witness to the incident, to the discharge, or to the removal costs or damages claimed, along with a brief description of that person's knowledge.

(10) A copy of written communications and the substance of verbal communications, if any, between the claimant and the responsible party or guarantor of the source designated under ' § 136.305 and a statement indicating that the claim was presented to the responsible party or guarantor, the date it was presented, that it was denied or remains not settled and, if known, the reason why it was denied or remains not settled.

(11) If the claimant has insurance which may cover the removal costs or damages claimed, the information required under § 136.111.

(12) A statement by the claimant that no action has been commenced in court against the responsible party or guarantor of the source designated under § 136-305 or, if an action has been commenced, a statement identifying the claimant's attorney and the attorney's address and phone number, the civil action number, and the court in which the action is pending.

(13) In the discretion of the Director, NPFC, any other information deemed relevant and necessary to properly process the claim for payment.

§ 136.107 Subrogated claims.

(a) The claims of subrogate (e.g., insured) and subrogee (e.g., insurer) for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants.

(b) A fully subrogated claim is payable only to the subrogee.

(c) A subrogee must support a claim in the same manner as any other claimant.

§ 136.109 Removal costs and multiple items of damages.

(a) A claimant must specify all of the claimant's known removal costs or damages arising out of a single incident when submitting a claim.

(b) Removal costs and each separate category of damages (as described in Subpart C of this part) must be separately listed with a sum certain attributed to each type and category listed.

(c) At the sole discretion of the Director, NPFC, removal costs and each separate category of damages may be treated separately for settlement purposes.

§ 136.111 Insurance.

(a) A claimant shall provide the following information concerning any insurance which may cover the removal costs or damages for which compensation is claimed:

(1) The name and address of each insurer.

(2) The kind and amount of coverage.

- (3) The policy number.
- (4) Whether a claim has been or will be presented to an insurer and, if so, the amount of the claim and the name of the insurer.
- (5) Whether any insurer has paid the claim in full or in part or has indicated whether or not payment will be made.
- (b) If requested by the Director, NPFC, the claimant shall provide a copy of the following material:
 - (1) All insurance policies or indemnification agreements.
 - (2) All written communications, and a summary of all oral communications, with any insurer or indemnifier.
- (c) A claimant shall advise the Director, NPFC, of any changes in the information provided under this section.

§ 136.113 Other compensation.

A claimant must include an accounting, including the source and value, of all other compensation received, applied for, or potentially available as a consequence of the incident out of which the claim arises including, but not limited to, monetary payments, goods or services, or other benefits.

§ 136.115 Settlement and notice to claimant.

(a) Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign to the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person.

(b) Claimant's failure to accept an offer of settlement within 60 days after the date the offer was mailed to the claimant automatically voids the offer. The Director, NPFC, reserves the right to revoke an offer at any time.

(c) A claimant will be notified in writing sent by certified or registered mail whenever a claim against the Fund is denied. The failure of the Director, NPFC, to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim.

(d) The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant

or within 30 days after receipt of the denial by the claimant, whichever date is earlier. Reconsideration may only be requested once for each claim denied. The Director, NPFC will provide the claimant seeking reconsideration with written notification of the decision within 90 days after receipt of the request for reconsideration. This written decision is final. The failure of the Director, NPFC, to make final disposition of a reconsideration within 90 days after it is received shall, at the option of the claimant any time thereafter, be deemed a final denial of the reconsideration.

Subpart C - Procedures for Particular Claims

REMOVAL COSTS

§ 136.201 Authorized claimants.

A claim for removal costs may be presented by any claimant.

§ 136.203 Proof.

In addition to the requirements of Subparts A and B of this part, a claimant must establish--

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.

§ 136.205 Compensation allowable.

The amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC.

NATURAL RESOURCES

§ 136.207 Authorized claimants.

(a) Claims for uncompensated natural resource damages may be presented by an appropriate natural resources trustee. However, in order to facilitate the processing of these claims with respect to a single incident where multiple trustees are involved and to prevent double recovery, the affected trustees should select a lead administrative trustee who will present consolidated claims on behalf of the trustees.

(b) A trustee may present a claim for the reasonable cost of assessing natural resources damages separately from a claim for the cost of developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources damaged.

§ 136.209 Proof.

In addition to the requirements of Subparts A and B of this part, a trustee must do the following:

(a) Submit the assessment and restoration plans which form the basis of the claim.

(b) Provide documented costs and cost estimates for the claim. Final cost estimates for conducting damage assessments or implementing a restoration plan may form the basis for a claim against the Fund for an uncompensated natural resources damage claim.

(c) Identify all trustees who may be potential claimants for the same natural resources damaged.

(d) Certify the accuracy and integrity of any claim submitted to the Fund, and certify that any actions taken or proposed were or will be conducted in accordance with the Act and consistent with all applicable laws and regulations.

(e) Certify whether the assessment was conducted in accordance with applicable provisions of the natural resources damage assessments regulations promulgated under section 1006(e)(1) of the Act (33 U.S.C. 2706(e)(1)). Identify any other or additional damage assessment regulations or methodology utilized.

(f) Certify that, to the best of the trustee's knowledge and belief, no other trustee has the right to present a claim for the same natural resources damages and that payment of any subpart of the claim presented would not constitute a double recovery for the same natural resources damages.

§ 136.211 Compensation allowable.

(a) The amount of compensation allowable is the reasonable cost of assessing damages, and the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources.

(b) In addition to any other provision of law respecting the use of sums recovered for natural resources damages, trustees shall reimburse the Fund for any amounts received from the Fund in excess of that amount required to accomplish the activities for which the claim was paid.

REAL OR PERSONAL PROPERTY

§ 136.213 Authorized claimants.

(a) A claim for injury to, or economic losses resulting from the destruction of, real or personal property may be presented only by a claimant either owning or leasing the property. (b) Any claim for loss of profits or impairment of earned capacity due to injury to, destruction of, or loss of real or personal property must be included as subpart of the claim under this section and must include the proof required under § 136.233.

§ 136.215 Proof.

(a) In addition to the requirements of Subparts A and B of this part, a claimant must establish --

- (1) An ownership or leasehold interest in the property;
- (2) That the property was injured or destroyed;
- (3) The cost of repair or replacement; and
- (4) The value of the property both before and after injury occurred.

(b) In addition, for each claim for economic loss resulting from destruction of real or personal property, the claimant must establish --

- (1) That the property was not available for use and, if it had been, the value of that use;
- (2) Whether or not substitute property was available and, if used, the costs thereof; and
- (3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

§ 136.217 Compensation allowable.

(a) The amount of compensation allowable for damaged property is the lesser of --
(1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;

- (2) The difference between value of the property before and after the damage; or
- (3) The replacement value.

(b) Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.

(c) Compensation for a claim for loss of profits or impairment of earnings capacity under § 136.213(b) is limited to that allowable under § 136.235.

SUBSISTENCE USE

§ 136.219 Authorized claimants.

(a) A claim for loss of subsistence use of natural resources may be presented only by a claimant who actually uses, for subsistence, the natural resources which have been injured destroyed, or lost, without regard to the ownership or management of the resources.

(b) A claim for loss of profits or impairment of earning capacity due to loss of subsistence use of natural resources must be included as part of the claim under this section and must include the proof required under § 136.233.

§ 136.221 Proof.

In addition to the requirements of Subparts A and B of this part, a claimant must provide

(a) The identification of each specific natural resource for which compensation for loss of subsistence use is claimed;

(b) A description of the actual subsistence use made of each specific natural resource by the claimant;

(c) A description of how and to what extent the claimant's subsistence use was affected by the injury to or loss of each specific natural resource;

(d) A description of each effort made by the claimant to mitigate the claimant's loss of subsistence use; and

(e) A description of each alternative source or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence.

§ 136.223 Compensation allowable.

(a) The amount of compensation allowable is the reasonable replacement cost of the subsistence loss suffered by the claimant if, during the period of time for which the loss of subsistence is claimed, there was no alternative source or means of subsistence available.

(b) The amount of compensation allowable under paragraph (a) of this section must be reduced by --

(1) All compensation made available to the claimant to compensate for subsistence loss;

(2) All income which was derived by utilizing the time which otherwise would have been used to obtain natural resources for subsistence use; and

(3) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.

(c) Compensation for a claim for loss of profits or impairment of earning capacity under ' § 136.219(b) is limited to that allowable under § 136.235.

GOVERNMENT REVENUES

§ 136.225 Authorized claimants.

A claim for net loss of revenue due to the injury, destruction, or loss of real property, personal property, or natural resources may be presented only by an appropriate claimant sustaining the loss. As used in this section and § 136.227, "revenue" means taxes, royalties, rents, fees, and net profit shares.

§ 136.227 Proof.

In addition to the requirements of Subparts A and B, a claimant must establish --

- (a) The identification and description of the economic loss for which compensation is claimed, including the applicable authority, property affected, method of assessment, rate, and method and dates of collection;
- (b) That the loss of revenue was due to the injury to, destruction of, or loss of real or personal property or natural resources;
- (c) The total assessment or revenue collected for comparable revenue periods; and
- (d) The net loss of revenue.

§ 136.229 Compensation allowable.

The amount of compensation allowable is the total net revenue actually lost.

PROFITS AND EARNING CAPACITY

§ 136-231 Authorized claimants.

(a) A claim for loss of profits or impairment of earning capacity due to the injury to, destruction of, or loss of real or personal property or natural resources may be presented by a claimant sustaining the loss or impairment. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income.

(b) A claim for loss of profits or impairment of earning capacity that also involves a claim for injury to, or economic losses resulting from destruction of, real or personal property must be claimed under § 136.213.

(c) A claim for loss of profits or impairment of earning capacity that also involves a claim for loss of subsistence use of natural resources must be claimed under § 136.219.

§ 136.233 Proof.

In addition to the requirements of Subparts A and B of this part, a claimant must establish the following--

(a) That real or personal property or natural resources have been injured, destroyed, or lost.

(b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.

(c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative

figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.

(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

§ 136-235 Compensation allowable.

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for --

- (a) All income resulting from the incident;
 - (b) All income from alternative employment or business undertaken;
 - (c) Potential income from alternative employment or business not undertaken, but reasonably available;
 - (d) Any saved overhead or normal expenses not incurred as a result of the incident;
- and
- (e) State, local, and Federal taxes.

GOVERNMENT PUBLIC SERVICES

§ 136.237 Authorized claimants.

A claim for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil may be presented only by a State or a political subdivision of a State incurring the costs.

§ 136.239 Proof.

In addition to the requirements of Subparts A and B of this part, a claimant must establish--

- (a) The nature of the specific public services provided and the need for those services;
- (b) That the services occurred during or after removal activities;
- (c) That the services were provided as a result of a discharge of oil and would not otherwise have been provided; and
- (d) The net cost for the services and the methods used to compute those costs.

§ 136.241 Compensation allowable.

The amount of compensation allowable is the net cost of the increased or additional service provided by the State or political subdivision. Subpart D - Designation of Source and Advertisement

GENERAL

§ 136.301 Purpose.

This subpart prescribes the requirements concerning designation of the source or sources of the discharge or threat of discharge and advertisement of these designations, including the procedures by which claims may be presented to the responsible party or guarantor.

§ 136.303 Definitions.

As used in this subpart --

"Advertisement" means the dissemination of information, including but not limited to paid advertisements, that are reasonably calculated to advise the public how to present a claim. "Designated source" means a source designated under § 136.305.

DESIGNATION OF SOURCE

§ 136.305 Notice of designation.

(a) When information of an incident is received, the source or sources of the discharge or threat are designated, where possible and appropriate. If the designated source is a vessel or facility, the responsible party and the guarantor, if known, are notified by telephone, telefax, or other rapid means of that designation. The designation will be confirmed by a written Notice of Designation.

(b) A Notice of Designation normally contains, to the extent known --

- (1) The name of the vessel or facility designated as the source;
- (2) The location, date, and time of the incident;
- (3) The type and quantity of oil involved;
- (4) The date of the designation;
- (5) The procedures for accepting or denying the designation; and
- (6) The name, address, telephone number, and, if available, telefax number of the responsible Federal official to whom further communication regarding the incident, advertisement of the incident or denial of designation should be directed.

§ 136.307 Denial of designation.

(a) Within five days after receiving a Notice of Designation under § 136.305, the responsible party or guarantor may deny the designation.

(b) A denial of designation must --

- (1) Be in writing;
- (2) Identify the Notice of Designation;
- (3) Give the reasons for the denial and provide a copy of all supporting documents;

and

(4) Be submitted to the official named in the Notice of Designation.

(c) A denial is deemed received on the date the denial is actually received by the official named in the Notice of Designation.

ADVERTISEMENT

§ 136.309 Advertisement determinations.

- (a) The Director, NPFC, determines for each incident the type, geographic scope, frequency, and duration of advertisement required.
- (b) In making the determination specified in paragraph (a) of this section, the Director, NPFC may consider --
 - (1) The nature and extent of economic losses that have occurred or are likely to occur,
 - (2) The potential claimants who are likely to incur economic losses;
 - (3) The geographical area that is or will likely be affected;
 - (4) The most effective method of reasonably notifying potential claimants of the designation and procedures of submitting claims; and
 - (5) Relevant information or recommendations, if any, submitted by, or on behalf of, the responsible party or guarantor of the designated source.
- (c) The Director, NPFC, provides the specific requirements for advertisement for each incident to the responsible party or guarantor of the designated source.
- (d) If a responsible party or guarantor has not denied designation in accordance with § 136.307, the party or guarantor shall advertise, in accordance with the requirements of this subpart, the designation and the procedures by which claims may be presented. The advertisement must begin not later than 15 days after the date of the designation made under § 136.305.
- (e) If there is no designation under § 136.305, if the source of the discharge or threat is a public vessel, or if the responsible party and guarantor of the source designated have denied the designation or failed to meet the requirements for advertisement in this section, the Director, NPFC, may advertise procedures for presenting claims.

§ 136.311 Types of advertisement.

Advertisement required by the Director, NPFC, will normally include one or more of the following:

- (a) Paid advertisements in a newspaper or newspapers having general circulation in the area designated by the Director, NPFC.
- (b) Notice posted in marinas, marine supply stores, bait and tackle shops, and other appropriate business establishments or public facilities in the area designated by the Director, NPFC.
- (c) News releases to newspapers, radio stations, television stations, and cable services having general circulation in the area designated by the Director, NPFC.
- (d) Other means approved by the Director, NPFC, under the circumstances of each case.

§ 136.313 Content of advertisement.

Each advertisement required by this subpart may be required to contain the following information or to indicate where this information may be contained:

- (a) Location, date, and time of the incident.

- (b) Geographical area affected, as determined by the FOSC or Director, NPFC.
- (c) Type and quantity of oil involved.
- (d) Name or other description of the source designated by the FOSC or Director, NPFC.
- (e) Name of the responsible party and guarantor of the designated source.
- (f) Name, address, telephone number, office hours, and work days of the person or persons to whom claims are to be presented and from whom claim information can be obtained.
- (g) The procedures by which a claim may be presented.
- (h) Other information required by the Director, NPFC, under the circumstances of each case.

PART 137 - DEEPWATER PORT LIABILITY FUND

- 8. The authority citation for Part 137 continues to read as follows:
Authority: 33 U.S.C. 1509(a), 1512(a), 1517(j)(1); 49 CFR 1.46.

Subpart F [Removed and Reserved]

- 9. In Part 137, Subpart F, Claims Procedures, is removed and reserved.

Dated:

Daniel F. Sheehan, Director
National Pollution Funds Center